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Supreme Court, U.S.
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In the

Supreme Court of the United States

IN THE INTEREST OF:
K.M.H., A Child Under the Age Eighteen
And
K.C.H., A Child Under the Age Eighteen
IN THE MATTER OF THE PATERNITY OF:
K.C.H. and K.M.H. by and through the next friend,
DARYL D. HENDRIX,

Petitioner,

and

SAMANTHA HARRINGTON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of State of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an unmarried woman, gave birth to twin daughters on May 18, 2005. The day after their birth, she filed a CINC [Child In Need of Care] petition, seeking to terminate Petitioner's parental rights. The petition identified Petitioner as "[t]he minor children's father" and alleged that the twins were in need of care "as it relates to the father" and that "the [f]ather should be found unfit and his rights terminated." The petition continued to refer to Petitioner throughout as the twins' father. On May 31, 2005, Petitioner filed an answer to the CINC petition and filed a separate paternity action acknowledging his financial responsibility for the children and claiming parental rights, including joint custody and visitation. The CINC and paternity actions were consolidated. The children had been conceived by means of artificial insemination, but the parents had known each other and were friends. Petitioner maintained that the parties had an oral agreement to co-parent the children. Respondent filed a motion to dismiss the paternity action, invoking K.S.A. 38-1114(f), which provides that a donor of semen to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman. The district court dismissed Petitioner's paternity action, without a hearing on the merits as to the Petitioner's fitness to be a parent, and terminated the Petitioner's parental rights, and the Supreme Court of Kansas affirmed. The district court's and the Kansas Supreme Court's holdings are in direct conflict with the hold-

ings of this Court, including *Stanley v. Illinois* 405. U.S. 645 (1972), (which found unconstitutional a state's statute wherein the children of an unmarried father, upon the death of the mother, were declared dependents without any hearing on parental fitness and without proof of neglect) and *Lehr v. Robertson* 463 U.S. 248 (1983), which held that "A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action. A statute which absolutely extinguishes a father's efforts to assert the rights and responsibility of being a father, in a case with such facts as those *sub judice,* runs contrary to due process safeguards." The statute itself is unconstitutional, as one of the dissenting justices in the instant case observed, it is a "generative statute of frauds," which divests children of half of their heritage, and potentially renders them wards of the state, on the basis of an implied waiver of the father's right to parent, violative of the father's due process rights. Moreover, this case, which deals with the impact of relatively new reproductive technology on traditional family norms and values was one of first impression in the state of Kansas, and adds to an emerging conflict in the statutes and holdings of various States as they grapple with the rights and responsibilities of parents and of their children who have been brought into the world by means of technologies and methods which may be the harbingers of the Brave New World foreseen by Aldous Huxley.

The questions presented are:

1. Whether K.S.A. 38-1114(f) is unconstitutional because it deprives biological fathers of their due process and equal protection safeguards in the absence of either a voluntary relinquishment or a judicial finding of unfitness.

2. Whether the Kansas Supreme Court erred in applying an intermediate level of scrutiny as if the equal protection claim was gender-based rather than applying strict scrutiny in a matter involving D.H.'s fundamental parental rights, and whether 38-1114(f) withstands strict scrutiny when the party asserting constitutionality must demonstrate a compelling state interest justifying the classification.

3. Whether the equal protection and procedural and substantive due process safeguards of the Fourteenth Amendment were denied to Petitioner when the district court and the Supreme Court of Kansas denied him standing to a hearing on the merits of the CINC and paternity petitions, on the basis of an implied waiver of fundamental rights, when such waiver has to be made knowingly, and accordingly the Petitioner's evidence of an oral agreement to co-parent,made by the parties prior to the birth of the children, was ignored.

4. Whether K.S.A. 38-1114(f) is unconstitutional because it denies children equal protection for rights to their paternity and the benefits of established paternity, and because the state abrogated its *parens patriae* responsibility and made decisions protecting its version of artificial insemination rather than the interests, needs, and rights of children and fathers.

5. Whether the district court and the Kansas Supreme Court erred in finding that the Petitioner's equal protection and due process rights to establish paternity and the children's rights to the companionship and financial support of their father were outweighed by and subordinate to the state's interest in protecting, by means of K.S.A. 38-1114(f) , women recipients against the potential claims of donors to parental rights and responsibilities, apparently expanding a woman's discretionary powers embodied in her to terminate a pregnancy to now include discretionary powers to divest her children who were born and are persons in being from a relationship of companionship and support from their father.

PARTIES TO THE PROCEEDING

The petitioner is Daryl D. Hendrix, a resident of the State of Kansas, referred to as D..H. in the proceedings below.

The respondent is Samantha Harrington, a resident of the State of Kansas, referred to as S.H. in the proceedings below.

K.M.H. and K.C.H. are children under the age of eighteen, both residents of the State of Kansas, and they were made parties to the proceedings below by virtue of a CINC [Child in Need of Care] petition filed by Samantha Harrington, and a paternity, support and joint custody petition filed by Daryl D. Hendrix, as their next friend. A guardian ad litem had been appointed for the children by the district court.

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PETITION FOR WRIT OF CERTIORARI

Daryl Hendrix respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Kansas in this case.

OPINIONS BELOW

The judgment of the District Court of Shawnee County, Kansas, granted the mother's Motion to Dismiss on December 27, 2005. The Kansas Supreme Court interpreted the District Court's ruling as a Motion for Summary Judgment and affirmed the District Court on October 26, 2007, then denied the father's Motion for Rehearing on December 18, 2007. The Kansas Supreme Court's opinion of October 26, 2007, is reported at 285 Kan.53, and at 169 P.3d 1025 (2007).

JURISDICTION

The Order denying rehearing is dated December 18, 2007. Appellate invokes this Court's jurisdiction over *In re K.M.H.* because the final judgment of the highest court of Kansas has been rendered. 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges and immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 666(a)(5)(L). The Public Health and Welfare.

Subchapter IV. Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services.

§ 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement.

(L) Standing of Putative Fathers.

Procedures ensuring that the putative father has a reasonable opportunity to initiate a paternity action.

K.S.A. Chapter 38: Minors. Article 11. Determination of Parentage.

38-1114. Presumption of paternity.

(a) A man is presumed to be the father of a child if:

. . .

(4) The man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment made in accordance with K.S.A. 38-1130 or 65-2409a, and amendments thereto.

(5) Genetic test results indicate a probability of 97% or greater that the man is the father of the child.

(6) The man has a duty to support the child under an order of support regardless of whether the man has ever been married to the child's mother.

(b) A presumption under this section may be rebutted only by clear and convincing evidence, by a court decree establishing paternity of the child by another man or as provided in subsection (c). If a presumption is rebutted, the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence.

(c) If two or more presumptions under this section arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control.

. . .

(f) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman. (App. 76).

K.S.A. 38-1115. Determination of father and child relationship; who may bring action; when action may be brought; revocation of acknowledgment.

(a) A child or any person on behalf of such a child, may bring an action:

(1) At any time to determine the existence of a father and child relationship presumed under K.S.A. 38-1114 and amendments thereto; or

(2) at any time until three years after the child reaches the age of majority to determine the existence of a father and child relationship which is not presumed under K.S.A. 38-1114 and amendments thereto.

STATEMENT OF THE CASE

This case presents a direct conflict between a state statute, which one of the dissenting opinions has aptly characterized as a "generative statute of frauds" and a father's fundamental right to parent, which was denied without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. (Hill J., dissenting, App, 64). The decisions of the Supreme Court of Kansas and the District Court of Shawnee County set a disturbing judicial precedent which will deprive the children of the parties, and of other children yet unborn, of their rights to paternal companionship, support and inheritance, without a best interests analysis. This case of first impression represents an attempt to harmonize the law with a growing phenomenon of mothers who

seek to bypass the rights of fathers through the use of artificial or assisted reproduction techniques. Many state statutes deal with artificial or assisted reproduction, a ruling by this Court in the instant case will help clarify the issues and protect the rights of fathers and children conceived by means of artificial insemination. (App. 76).

The majority's opinion below appears to view the two parties and their two children as a novel "test case," treating the children that were conceived by the parties as objects, governed by principles of contract law, rather than as human beings who deserve the protections afforded to them by operation of traditional family law principles, which view the best interests of children as the paramount objective. Respectfully, the opinion of the Kansas Supreme Court, by focusing on the apparent novelty of reproductive techniques, serves to undermine the strong physical and emotional bonds between mothers, fathers and children by which human families and the human race has been perpetuated, since time immemorial. In doing so, the Supreme Court of Kansas has divested the unnamed two children who should have been at the center, and not the periphery of the court's attention, of their birthright to something which is of inestimable value: the love, affection and companionship of a father who took extraordinary measures to see them come into this world, who exchanged promises with the mother to co-parent the children, who immediately accepted financial and moral responsibility for them, and who has made every possible effort available to him to be a part of his children's lives, and whose fundamental rights to in fact be allowed to

be a father, have been frustrated by a mechanistic application of a law which, without due process, cut off his parental rights *ab initio*.

Petitioner respectfully submits that at the center of this Court's attention should be a basic and fundamental truth: families have been the corner stone of human society wherever it has been found, and the relationship between children and their mothers and fathers is crucial to the development of healthy and happy individuals, and in turn of a just and welcoming community. Yet in modern times the family unit has come under steady assault. The disintegration of families and the new prevalence of children born out of wedlock and single parenthood has brought poverty and uncertainty to many children, and the marginalization of fathers is a phenomenon that perpetuates itself. The decision of the Kansas Supreme Court, left undisturbed, will help create a new under class of children, who will not be able to petition their legally non-existent fathers for support, and will in all likelihood leave these children with a permanent and unnecessary sense of loss and abandonment.

This Court should decide the important question of whether a father can be deemed to have waived his rights, and the rights of his children to a parent-child relationship by not entering into a written agreement with the mother, when there was evidence that the father and the mother had in fact agreed to co-parent, and the existence of the statute was not know to the father, who was not a lawyer, and may have been known by the mother, who was his friend, and was a lawyer. More fundamentally, this Court should decide

the important question of whether, by operation of this statute, a father and a mother, or the state, can bargain away children's rights to the monetary and emotional support of their father.

A. The Underlying Petitions and Judgment

Because of the procedural posture of this case wherein the father was denied standing at the outset of the case the Kansas Supreme Court was presented with a cold record, wherein many of the underlying facts were not disputed, as the father's lack of standing prevented him from introducing evidence, and for that evidence to pass through the crucible of cross examination and credibility determinations of trial or evidentiary hearing. The record, as it is, shows that the mother, S.H., is an unmarried female lawyer who wanted to become a parent through artificial insemination from a known donor. She was a friend of the donor, D.H., an unmarried male nonlawyer, who agreed to provide sperm for the insemination. Both S.H. and D.H. are Kansas residents, and their oral arrangements for the donation occurred in Kansas, but S.H. underwent two inseminations with D.H.'s sperm in Missouri.

D.H. accompanied S.H. to a Missouri clinic for the first procedure and provided the necessary sperm to medical personnel. The first procedure did not result in a pregnancy. D.H. did not accompany S.H. to Missouri for the second procedure. Instead, he provided the sperm to S.H., and she took the sperm across state lines and delivered it to the Missouri physician responsible for the insemination. The

second procedure resulted in S.H.'s pregnancy and the birth of the twins.

There was no formal written contract between S.H. and D.H. concerning the donation of sperm, the artificial insemination, or the expectations of the parties with regard to D.H.'s parental rights or lack thereof.

The twins were born on May 18, 2005. The day after their birth, S.H. filed a CINC petition concerning the twins, seeking a determination that D.H. would have no parental rights. The petition identified D.H. as "[t]he minor children's father" and alleged that the twins were in need of care "as it relates to the father" and that "the [f]ather should be found unfit and his rights terminated." The Respondent alleged in her CINC petition that there were several reasons for termination of D.H.'s parental rights, including his alleged failure to provide pre-natal and financial support. (App. 63). By pointing out these alleged failings in providing pre-natal emotional and financial support, S.H. implied that she intended D.H. to play a role in the parenting process. (App. 63). The petition continued to refer to D.H. throughout as the twins' father, and as Justice Caplinger notes in her dissenting opinion notes, the CINC petition made mention of D.H. as the children's father no less than 56 times. (App. 63). No reference or mention was made in the CINC petition of K.S.A. 38-1114(f). (App. 63, App. 76).

On May 31, 2005, D.H. filed an answer to the CINC petition and filed a separate paternity action acknowledging his financial responsibility for the children and claiming parental rights, including joint custody and

visitation. The CINC and paternity actions were consolidated. S.H. filed a motion to dismiss the paternity action, for the first time invoking K.S.A. 38-1114(f). This first mention of K.S.A. 38-1114(f) was made by Respondent more than two weeks after Petitioner's filing of an amended petition. (App. 63). After the motion was filed, the district judge raised questions concerning choice of law and the constitutionality of the statute and ordered the parties to brief these issues along with the other issues arising out of the motion to dismiss. (App. 68).

The District Court of Shawnee County in its findings of facts noted that the parties disagreed as to whether Petitioner was to have any parental role after the birth of the children. (App. 69). Petitioner challenged the constitutionality of K.S.A. 38-1114(f) in the proceedings before the district court. (App. 71). Petitioner first raised the issue of the constitutionality of the statute in his Memorandum in Response to the Motion to Dismiss, wherein he discusses the 14th amendment and due process rights in general. (Memorandum in Response to Motion to Dismiss, p 4). Citing to *In Re D.B.S.*, 20 Kan.App.2d 438 (KS Ct. App. 1995), Petitioner discussed the balancing of state's interests and putative father's interest. (Id.). In the Memorandum, Petitioner also discussed a Texas case, wherein, under analogous circumstances, a father was found to have standing to litigate the issue of paternity. (Memorandum in Response to Motion to Dismiss, p.4, 5, citing to *In re: Sullivan* 15 S.W. 3d 911 (Ct. App. Texas 2005). In a subsequent Memorandum Brief, Respondent further addressed the issue of the constitutionality of the Statute, and discussed an Ohio

case that found that a similar donor statute was unconstitutional because it was applied without discrimination to known and unknown donors and made no exception for an agreement, and because public policy supports the concept of legitimacy and the concomitant rights of a child to support and inheritance. (Memorandum Brief of Daryl D. Hendrix, p. 7, citing *C.O. v. W.S.*639 N. E. 2d 523 (Court of Common Pleas, Ohio, 1994). In the same pleading Petitioner buttressed his constitutional arguments with citations to *Lehr v. Robertson* 463 U.S. 248 (1983), and *Steven S. v. Deborah D.* 25 Cal. Rptr. 3d 482 (2005). (Memorandum Brief of Daryl D. Hendrix, p. 7,8).

The district court declined to find the statute unconstitutional, stating that "The public policy advanced appears to make good sense of advancing reproductive options and avoiding litigation while affording a method of protecting a donor's interests if he so desires. The public policy embodied in the statute does not appear to violate any Kansas or United States constitutional rights." (App. 72, 73). The district court further held that since there was no written agreement, it would find that Respondent had no responsibilities concerning the children. (App. 75).

B. Proceedings Before the Appellate Court of Kansas

While a timely notice of appeal had been filed, the Appellate Court of Kansas did not pass on the merits of this cause, as the Supreme Court of Kansas granted

a Motion to Transfer the Case directly to the Supreme Court of Kansas. (App. 67).

C. The Kansas Supreme Court Finds the Statute Constitutional

At the heart of the Kansas Supreme Court's ruling was the finding that there was a compelling state interest overriding Petitioner's claim to paternity, and the rights of the children to know and be supported by their father: "K.S.A. 38-1114(f) envisions that both married and unmarried women may become parents without engaging in sexual intercourse, either because of personal choice or because a husband or partner is infertile, impotent, or ill. **It encourages men who are able and willing to donate sperm to such women by protecting the men from later unwanted claims for support from the mothers or the children.** *It protects women recipients as well,* **preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement.** Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability. Although the timing of entry into a written agreement is not set out explicitly, the design of the statute implicitly encourages early resolution of the elemental question of whether a donor will have parental rights. Effectively, the parties must decide whether they will enter into a written agreement before any donation is made, while there is still balanced bargaining power on both sides of the parenting equation.In our view, the statute's gender classification substantially furthers and is

thus substantially related to these legitimate legislative purposes and important governmental objectives." (App. 33, 34). (emphasis added).

D. The Dissenting Opinions

In her dissent, Justice Caplinger took issue with the majority's holding that K.S.A.38-1114(f) passed constitutional muster because it included an opt-out provision, and that accordingly, Respondent's "own *inaction* before donating his sperm" left him unable to meet the statute's requirements of a written agreement. Justice Caplinger found this at the core of the constitutional problem with the statute, as fundamental rights must be actively waived, rather than passively lost due to inaction. Justice Caplinger observed that the Supreme Court has held that the Fourteenth Amendment "guarantees more than fair process" and "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Justice Caplinger noted that it is well established that the right to parent is a fundamental right protected by the United States Constitution. See, *e.g.*, *Troxel*, 530 U.S. at 65-66, 120 S.Ct. 2054; *Stanley v. Illinois*, 405 U.S. 645, 651-52, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). (App. 54)

Justice Caplinger also noted that the Supreme Court has further consistently held that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*,

304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" and thus must result from a free and conscious choice. 304 U.S. at 464, 58 S.Ct. 1019. And, when faced with a waiver of a fundamental right, courts "do not presume acquiescence in the loss of fundamental rights." 304 U.S. at 464, 58 S.Ct. 1019; see also *Hodges v. Easton*, 106 U.S. (16 Otto) 408, 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882) (right to trial by jury in a civil case is a fundamental right and every reasonable presumption must be indulged against its waiver). Justice Caplinger observed that the majority recognizes that K.S.A. 38-1114(f) permits a donor to waive his right to parent simply by his own inaction rather than through an intentional act relinquishing that right. For that reason, Justice Caplinger found that the statute's "escape clause" does not satisfy due process requirements. (App. 55).

Justice Caplinger noted that the majority's reliance on *Lehr v. Robertson* was misplaced: in that case the state's interests of maintaining a child in a stable two parent family relationship by way of an adoption argued in favor of application of the New York Putative Father Registry statute, which cut off a putative father's rights to parenthood as a result of his failure to register with the Putative Father registry. (App. 57). *See also Michael H. and Victoria D. v. Gerald D.* 491 U.S. 110 (1989) (upholding a state statute's presumption of legitimacy of a child born to a married couple against challenge against a biological father who had an extramarital affair with the child's mother, this Court holding that the state's interest in

the preservation of the existing marital and family unit is a more significant concern than a biological father's assertion of paternity). (App. 58, 59).

Justice Caplinger observed that unlike in *Lehr,* the Kansas Supreme Court was not faced with a situation in which an additional party seeks to assert parental rights, instead, only the biological father seeks to assert his rights to parent his children. Thus, Justice Caplinger observed, the need for a determination of parental rights does not exist in the same urgency that it exists in an adoption situation. (App. 59).

Justice Caplinger concluded that the application of the statute to the facts of this case was offensive to the Due Process Clause:

" A putative father has come forward to participate in the rearing of his children, emotionally and financially; consequently, his interest in doing so is entitled to full protection under the Due Process Clause. Instead of being given this protection and an opportunity to prove that he intended to actively parent his children, D.H. has been subjected to the workings of a statute of which he was unaware, that required him to "opt in" to fatherhood before ever donating his sperm, or be forever barred from parenting his children.

I strongly disagree with the majority's conclusion that D.H.'s own inaction, whether due to ignorance of the law or otherwise, constituted a waiver of his rights to parent. Because the rights to parent are fundamental, those rights may be waived only through an intentional, free, and meaningful choice. Here, the record indicates D.H. was not even aware of K.S.A. 38-

1114(f), much less its requirement that he must enter into a written agreement formalizing his intent to parent his child before he provided his sperm to S.H. I would find the statute's requirement that a known sperm donor affirmatively take action to preserve his fundamental rights to parent constituted a violation of due process as applied to D.H." (App. 60)

Justice Hill's dissent focused on the disenfranchisement of the children:

"The majority offers the children sympathy. But is this in their best interests? The trial court never got to the point of deciding the best interests of the children because it was convinced that such a consideration was barred by the operation of K.S.A. 38-1114(f) to a known donor. None of the elaborate and meticulous safeguards our Kansas laws afford parents *and children* in proceedings before our courts when confronted with questions of parentage have been extended to these children. A quick glance over our procedures dealing with the Kansas Parentage Act (K.S.A. 38-1110 *et seq.*) or our Code for Care of Children (K.S.A. 38-1501 *et seq.*) reveals the great caution we take in this state when courts must consider such relationships. While it is true that an attorney was appointed to represent the children in the original child in need of care case, the record from their point of view remains silent. Instead only the voices of mother and "semen donor" are heard in district court and this court as well." (App. 60).

REASONS FOR GRANTING THE PETITION

This case presents the Court with a much-needed opportunity to require that participants of assisted reproductive technologies follow the Constitution. With the most precious fundamental liberty interests at stake - the right to parent one's children, to be parented by one's parents, and the best interests of the children themselves, the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to everyone – mothers, fathers, and children have individual rights deserving of protection. As can be seen in the compilation of state statues set forth in the Appendix, guidance from this Court will prevent a systematic deprivation of due process rights of parents and children under circumstances which are likely to be repeated. (App. 79). As will be further examined below, various courts, under analogous circumstances, have reached diametrically different results. Consistency and predictability, without the sacrifice of fundamental rights argue for this Court's review.

Second, this case is also about Due Process safeguards due to individuals and how the courts below violated these Constitutional guarantees. On multiple occasions, the courts below denied D.H.'s rights to basic fair procedures and an opportunity to be heard in a meaningful way. He was denied standing by the district court at what for him was unquestionably the most crucial time of the case: when he could dispute through cross-examination the claims of the mother that the two of them had no agreement and when he could present evidence and witnesses to his claims that such an agreement existed. The denial of stand-

ing hampered and harmed D.H. throughout the process of his appeals. The opportunity to appeal does not replace the opportunity to present one's case in court.

If the Kansas Supreme Court's decision's statutory construction stands, courts in future cases will face a confusing, if not alarming, dilemma. Single mothers could have children by contract. Such mothers can choose and control whether or not their children have fathers. The benefits that children accrue from established paternity may be silently waived by parents whose interests are not congruent with those of the child, yet whose interests the government labels as "legitimate" or "important."

For decades the law has prohibited parents from bartering and contracting over their parental rights and the obligations owed to children. Now, what were once the problems to which paternity law was applied (e.g., namely, mothers unwilling to file for paternity on behalf of her child and a father unwilling to provide emotional and financial support for his progeny) are characterized as legitimate and important government interests. There is something fundamentally wrong with this picture.

Not since the line of unwed father's rights cases culminating in *Lehr v. Robertson*,463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed. 2d 614 (1983), and the line of paternity cases culminating in *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988), has this Court had occasion to reinforce the government's *parens patriae* authority to protect the liberty interests of children and their relationships with their

fathers. The 1973 Uniform Parentage Act (UPA) affirmed the constitutional mandate to treat children equally by establishing that, "regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other." The decision below threatens to undo the gains of both children and fathers when the children are born via artificial insemination.

Negotiations between the UPA Drafting Committee and the American Bar Association Individual Rights and Responsibilities Section (joined by the Unmet Legal Needs of Children) resulted in assurances that "a child born to an unmarried man and woman, including children born through assisted reproduction . . . should have the same rights and relationship with his or her parents or intended parents as a child born to a married couple." John Sampson, *Preface to the Amendments to the Uniform Parentage Act* (2002), 37 Fam. L. Q. 4 (2003). This promise, however, like the promise made in this case, has not been kept. Despite the requirement of 42 U.S.C. §666(a)(5)(L) (which stemmed from the Federal Support Act of 1988) that putative fathers must have a reasonable opportunity to initiate a paternity action in order for states to receive federal matching funds, the 2002 UPA states, "The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation." See UPA (2002), section 702, cmt.

In light of the Kansas Supreme Court's disregard for the constitutional safeguards of the father and the two children in this case, in light of the need for the rights and interests of children to be protected by the state's

parens patriae authority, and in light of the destabilizing impact of this decision on fundamental constitutional guarantees to parental rights and paternity in the context of artificial insemination, this Court's authoritative guidance is badly needed.

I. CERTIORARI SHOULD BE GRANTED TO PROTECT A FATHER'S FUNDAMENTAL RIGHTS TO THE CARE, CUSTODY AND CONTROL OF HIS CHILDREN IN THE CONTEXT OF ARTIFICAL REPRODUCTION

A. A father's fundamental right to the care, custody, and control of his children is protected under the due process and equal protection clauses of the Fourteenth Amendment and cannot be deprived without a conscious, voluntary relinquishment or a judicial finding of unfitness.

1. The father's fundamental liberty interests in his parental rights to the care, custody, and control of his children.

The United States Supreme Court has upheld a parent's fundamental right to the care, custody, and control of their children. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000). *Stanley v. Illinois* 405. U.S. 645 (1972), *Lehr v. Robertson* 463 U.S. 248 (1983) These fundamental liberty interests are protected by the Fourteenth Amendment that establishes that a state cannot "deprive any person of life, liberty, or property, without due process of law, nor deny any person

within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV.

2. Fundamental constitutional rights cannot be waived by passive acquiescence.

In her dissent, Caplinger, J. notes that:

> The Supreme Court has consistently held that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" that must result from a free and conscious choice. 304 U.S. at 464. And, when faced with a waiver of a fundamental right, courts "do not presume acquiescence in the loss of fundamental rights." 304 U.S. at 464; see also *Hodges v. Easton*, 106 U.S. (16 Otto) 408, 412, 27 L.Ed. 169, 1 S.Ct. 307 (1882)(right to trial by jury in a civil case is a fundamental right and every reasonable presumption must be indulged against its waiver. *In re K.M.H.*, (App. 55).

The Fourteenth Amendment to the United States Constitution states that no State shall "deprive any person of life liberty, or property, without due process of law." The Supreme Court has held that the Fourteenth Amendment "guarantees more than fair process" and "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and

liberty interests.'" *Troxel*, 530 U.S. at 65. Further, the Supreme Court has held that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), 82 L.Ed. 1461, 58 S.Ct. 1019. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson*, 304 U.S. at 464. A person can waive a fundamental constitutional right so long as this waiver is voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 U.S.436, 475 (1966). It is the duty of all parties to ensure that a person's decision to waive a fundamental right is a free and meaningful decision. *DeLuca v. Ford*, 858 F.Supp.1330 (S.D.N.Y.1994). A person's fundamental rights are personal to him and must be the one who makes this ultimate decision as to whether he will waive his basic and fundamental rights. When faced with a waiver of fundamental right, courts "do not **presume** acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Respectfully, in its majority opinion, the Supreme Court of Kansas disregarded the precedent well-established by the highest court of the United States when determining whether D.H. "waived" his right to parent. The Kansas Court erred in its majority opinion finding that K.S.A. 38-1114(f) "establishes the clear default positions of parties to artificial insemination. If these parties desire an arrangement different from the statutory norm, they are free to provide for it, as long as they do so in writing. "(App. 34). The very fact that there is a "default" position involving a fundamental right is a constitutional violation and

does not follow the precedent consistently set forth by the United States Supreme Court. D.H. did not waive his fundamental right to parent his children. There is no written agreement between D.H. and S.H. that suggests that D.H. waived his parental rights to his children. There is no evidence to suggest there was an oral agreement between D.H. and S.H. that D.H. waived his fundamental right to parent his children. This court did not "indulge every reasonable presumption against waiver of fundamental constitutional rights" in this case as *Johnson* court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). This court did not find that D.H.'s "waiver" was voluntary, knowing and intelligent as required by *Miranda*. *Miranda v. Arizona*, 384 U.S.436, 475 (1966). Instead, this court ***presumed*** that D.H. acquiesced to the loss of his parental rights by operation of K.S.A. 38-1114(f), contrary to the United States Supreme Court findings in *Johnson*. *Johnson v. Zerbst*, 304 U.S. 458 (1938). K.S.A. 38-1114(f), as written and interpreted by the Kansas court's majority opinion is unconstitutional as it deprives D.H's Fourteenth Amendment right to parent without due process of law, the Kansas court did not follow the precedent set forth by the United States Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Miranda v. Arizona*, 384 U.S.436, 475 (1966). Instead the Kansas Supreme Court found that the default positions of the statute sufficiently afforded D.H. due process of law and disregarded *Miranda* and *Johnson*'s analysis of how a waiver of a fundamental right should be considered. D.H. did not voluntarily, knowingly and intelligently make a decision to waive his fundamental right to parent, and accordingly his due process rights were violated.

3. The rights of an unwed father cannot be terminated without an opportunity to be heard on the issue of parental fitness.

The father also cited to *Stanley v. Illinois*, the 1973 Supreme Court case holding that the rights of unwed father could not be terminated by presumption or without an opportunity to be heard on the issue of parental fitness. 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1973).

In her dissent in the appellate court below, Justice Caplinger again explained:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.(App. 62).

II. THE KANSAS SUPREME COURT'S FLAWED EQUAL PROTECTION ANALYSIS, AND APPLICATION OF AN INCORRECT LEVEL OF SCRUTINY SETS AN IMPROPER PRECEDENT

The Fourteenth Amendment of the United States Constitution states that no state shall "deny any person within its jurisdiction the equal protection of the law." Not only does D.H. challenge the constitutionality of the statute as it applies to him, he chal-

lenges the constitutionality as it applies to known sperm donors who desire to be active fathers. The Kansas court mistakenly determined that D.H.'s equal protection challenge is gender-based only; however, the current categorization of "donor of sperm" as written and applied in this statute violates the equal protection of known donors who desire to be fathers. Such categorization interferes with a specific gender's fundamental right to family. Such categorization requires the application of strict scrutiny and not intermediate scrutiny.

Strict scrutiny is applied when the classification involves a suspect classification, i.e., race, ancestry, and alienage; or categorizations impinging upon a fundamental right, i.e., privacy, marriage, voting, traveling, and freedom of association. *Hoffman v. US*, 767 F.2d 1431, 1434 (Cal.1985) *citing* *McLaughlin v. Florida*, 379 U.S. 184, 191-92, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964), *Oyama v. California*, 332 U.S. 633, 644-46, 68 S.Ct. 269, 274-75, 92 L.Ed. 249 (1948), *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971), *Roe v. Wade*, 410 U.S. 113, 154-64, 93 S.Ct. 705, 727-32, 35 L.Ed.2d 147 (1973), *Zablocki v. Redhail*, 434 U.S. 374, 383-87, 98 S.Ct. 673, 679-81, 54 L.Ed.2d 618 (1978), *Bullock v. Carter*, 405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972), *Shapiro v. Thompson*, 394 U.S. 618, 627, 89 S.Ct. 1322, 1327, 22 L.Ed.2d 600 (1969), *NAACP v. Alabama*, 357 U.S. 449, 460-62, 78 S.Ct. 1163, 1170-72, 2 L.Ed.2d 1488 (1958). To withstand strict scrutiny, a statute must be precisely tailored to serve a compelling state interest. *Hoffman v. US*, 767 F.2d 1431,1435.

Strict scrutiny most definitely is the proper test in this case because the statute impermissibly interferes with the exercise of a fundamental right to parent. Any father who knowingly donates his sperm to a known unmarried woman automatically has a fundamental right to parent when a child is conceived. It should not matter if the parties were sexually involved or if the parties choose artificial insemination to create a child. The court erred in determining that D.H.'s equal protection challenge is a solely gender-based. Not only does the statute discriminate between a woman's right and a father's right as a result of anatomy, it essentially allows a woman's right to parent trump a man's right to parent for the very same reason and interferes with the fundamental rights of fathers who choose to procreate by insemination. At a minimum, a known donor who voluntarily donates sperm to a known unmarried woman is fully aware of his actions and responsibilities if a child is conceived as a result of insemination. Once a child is born, both parents have the fundamental right to parent that child. Understanding the public policy behind the protection of unknown sperm donors and unmarried women desiring to be single parents, K.S.A. 38-1114(f) generally categorizes the unknown sperm donors and the known sperm donors into one statute and apply the protection of the unknown sperm donor to the know sperm donor. Although the statute is a blanket protection for the unknown sperm donors, it is a blanket bar to parenthood for known sperm donors who had the intent of exercising their fundamental right to parent.

Kansas is one of 25 states that has a statute addressing single parents' use of artificial insemination to conceive children. Kansas is one of five states that have included a writing requirement in its statute. The theory is that the writing requirement is that it protects the donor's Due Process rights. The facial validity of this statutory construction is both deceiving and open to deception. It assumes many things that are not always present – namely, logical decisions made in logical sequences as if everybody knew the law, everybody trusted one another, and nobody ever changed their mind. What looks like a simple binary decision (either there is a writing or there is not) that everybody would understand (either sign an agreement to be a parent or remain silent to not be a parent), that is done before anybody commits to anything (decision is made pre-insemination), and that is always something everyone remains forthright and honest about (everyone keeps their promises and tells the truth), is often far from any of these things. The statute interprets the absence of a written agreement as if there is no agreement, when in fact there had to be some kind of agreement between the parties in order for the mother to receive the semen. Any oral agreement between the parties for the father to waive his parental obligations would be unenforceable as against public policy; it would not be binding. Yet the statute's written agreement requirement appears to void any oral agreement to share parental obligations because it was not written down. When parents can agree, and when that agreement is not harmful to the child, parental agreement is enforced as in the best interests of the child. From the perspective of the child, the statute sanctions a "conspiracy of silence"

and "deliberate falsity" between the parents. In order to achieve the desires of unmarried mothers who wish to raise a child without a father, the Kansas statute requires both a "conspiracy of silence" and "deliberate falsity" between the mother and sperm donor. They must orally agree to waive the donor's parental rights and obligations, yet they must also act like there is no such agreement because any agreement would be unenforceable as against public policy. The Kansas Supreme Court recognized that D.H.'s fundamental rights were at stake but neither applied strict scrutiny consistent with this recognition, nor correctly characterized D.H.'s equal protection argument as based on comparisons to other unwed fathers rather than being gender-based, nor placed the appropriate burden on the party asserting the constitutionality of the statute to demonstrate a compelling state interest justifying the classification. The Kansas Supreme Court mischaracterized D.H.'s equal protection argument as gender-based . . . and it did so in a way that it later denies when this is claimed to be unconstitutional. For example, in its equal protection analysis, the Kansas Supreme Court states:

> K.S.A. 38-1114(f) draws a gender-based line between a necessarily female sperm recipient and a necessarily male sperm donor for an artificial insemination. By operation of the statute, the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female. . . We also reject the

> argument from D.H. and the Center that the statute inevitably makes the female the sole arbiter of whether a male can be a father to a child his sperm helps to conceive. (App. 31-34).

Petitioner's equal protection claim is that he be treated like other unwed fathers. The parental rights of other unwed fathers can neither be limited to a pre-insemination opportunity to negotiate an agreement with the mother nor terminated without an explicit waiver or a showing of parental unfitness.

III. THE DECISION BELOW ABDICATES THE COURT'S ROLE AS PARENS PATRIE IN CONSIDERING THE BEST INTERESTS OF THE CHILDREN

Acting in the best interests of children is a part of the government's exercise of it's *parens patriae* authority in every other context involving children: artificial insemination should not be an exception. While the traditional presumption that parents act in the best interests of children applies to most situations, parents do not possess absolute and unreviewable discretion with respect to their children. *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, L.Ed. 2d 101 (1979)(holding that considerations of a child's rights limits parents from exercising absolute and unreviewable discretion). The Constitution's protects parents' fundamental liberty interests in the care, custody, and control of their children, but this Court has never held that the parents' interests should act as a rigid constitutional shield, protecting every arbitrary parental decisions from challenge. *Troxel v.*

Granville, 530 U.S. 57, 86, 120 S.Ct. 2054, 2072, 147 L.Ed. 2d 49, 68-9 (2000)(Stevens, J., dissent).

Limiting the father's opportunity (and hence, the child's opportunity) to establish parental rights during negotiations between the parents in a period pre-insemination does not present a reasonable opportunity for the child or someone with an interest in the child to assert claims on their behalf. *Clark v. Jeter*, 486 U.S. 456, 457, 108 S.Ct. 1910, 100 L.Ed. 2d 465 (1988). Indeed, the child is placed in a precarious position because his or her interests may not be congruent with those of either parent, particularly when they are encouraged to silently contract away the child's rights to his or her parentage.

This Court has held that, when a mother is unwilling to file a paternity action on behalf of her child to exercise the child's rights to his or her second parent, the mother's and the child's interests are no longer congruent. *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed. 2d 770 (1982). This Court has also held that a putative father "has no legitimate [protectable] right and certainly no liberty interest in avoiding financial obligations to his natural child that are imposed by state law." *Rivera v. Minnich*, 483 U.S. 574, 107 S.Ct. 3001, 97 L.Ed. 2d 473 (1987).

Indeed, if K.S.A. 38-1114(f) is held to allow the mother and father to contract away the child's paternity, it affords the child no opportunity at all. This is a patent violation of the child's rights to equal protection of the law.

This Court established a precedent that a child's rights to paternal support cannot be ignored or abdi-

cated in a series of three paternity cases in this Court during the 1980s.

First, the Court held that a Texas statute providing only one year for establishing paternity denied illegitimate children equal protection of law. *Mills v. Habluetzel*, 456 U.S. 91 (1982). Then the Court held that Tennessee's two year statute of limitations on paternity actions did not provide illegitimate children with an adequate opportunity to obtain support. The Court held this time limitation was not substantially related to the legitimate state interest in the litigation of stale or fraudulent claims and therefore violated certain children equal protection. *Pickett v. Brown*, 461 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983). And finally, the Court struck down Pennsylvania's six-year statute of limitations on the establishment of paternity. *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

In the latter case, Justice O'Connor wrote for a unanimous court and specifically addressed the possibility of a mother's unwillingness to assert a paternity claim on behalf of her child. O'Connor's opinion also reflected a view of paternity cases as a diverse class of different situations rather than as a simplified notion of a father having abandoned a mother and child.

> The 6-year statute of limitations violates the Equal Protection Clause. Under the heightened scrutiny analysis used in evaluating equal protection challenges to statutes of limitations that apply to illegitimate children's paternity suits, **the period**

> **for obtaining support must be sufficiently long to present a reasonable opportunity for those with an interest in illegitimate children to assert claims on their behalf, and any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.** [emphasis added] [citing *Mills* and *Pickett*]. Under this analysis, it is questionable whether Pennsylvania's 6-year period is reasonable, since a mother may for years after her child's birth be unwilling to assert a claim due to her relationship with the natural father, . . . since a mother might realize only belatedly a loss of income attributable to the need to care for the child; and since financial difficulties are likely to increase as the child matures and incurs additional expenses. *Clark v. Jeter*, 486 U.S. 456-7, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

The dynamics of these relationships required careful problem solving. For example, when an unmarried couple lived together and the father supported the child, the filing of a paternity action might seem unnecessary and the filing of a paternity action might actually disrupt the relationship. Such a filing might be perceived as an indication that the mother was preparing to exit the relationship with the father. The opinion demonstrates a compelling state interest in a child's right to file a paternity petition and to attach child support obligations on natural fathers who had lived with the mothers and the children for several years, then decide to leave. To do otherwise would

create bizarre incentives where, for example, a father might stay with the mother and child until any statute of limitations expired, then leave without incurring child support obligations. This result would leave the mother alone to raise the child. The importance of having two parents cannot be overemphasized In a recent line of cases, the New York Courts have upheld a "paternity" action for support in failed relationships between lesbian lovers who had chosen to parent by means of anonymous sperm donation. H.M. v. E.T. 851 N.Y.S. 2d 58 (Unreported Disposition, New York Family Court, 2007), see also *Beth R. V. Donna* M. 2008 WL 61031 (N.Y. Sup. 2008) (female same sex partner granted standing to pursue custody and visitation, on basis of recognition of Canadian same sex marriage), see also *Browne v. D'Alleva* 2007 WL 4636692 (Conn Super. 2007) (granting standing to seek paternity to a known biological father who donated sperm to a lesbian couple).

IV. ALLOWING A MOTHER TO UNILATERALLY DENY A FATHER'S OPPORTUNITY FOR PATERNITY VIOLATES THE FATHER'S DUE PROCESS AND EQUAL PROTECTION SAFEGUARDS OF THE FOURTEENTH AMENDMENT BY EXPANDING HER DISCRETIONARY POWERS TO SECURE AN ABORTION WITHOUT PATERNAL INTERFERENCE, TO GRANT HER PRESUMED DISCRETIONARY POWERS TO TERMINATE THE FATHER'S PARENTAL RIGHTS AFTER THE BIRTH OF THE CHILDREN.

While the Kansas Supreme Court contends that the father's constitutional guarantee of an opportunity ends upon insemination, the Kansas Supreme Court also argues that, even if the father's opportunity interests survive post-conception, the statute remains constitutional because it is "consistent with United States Supreme Court precedent making even a married pregnant woman the sole arbiter, regardless of her husband's wishes, of whether she continues a pregnancy to term." See *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69-71, 96 S.Ct. 2831, 49, L.Ed. 2d 788 (1976). (App. 38).

The Kansas Supreme Court's reference to a mother's right to unilateral decision making about an abortion, seen in the context of a case where a father attempted to establish rights to existing, viable children that had already been born, extends a mother's presumed discretionary power to an impermissible extent. (App. 38). The mother's unilateral authority to terminate her pregnancy relates to her decisions concerning her

carrying first an embryo, then a fetus. A fetus is not a constitutionally recognized person and has no constitutional rights prior to birth. *Roe v. Wade*, 401 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973). Yet a state's interests encumber the mother's unilateral decision making process at the point of viability, or, in other words, precisely when her unborn progeny is no longer an embryo or fetus, but a child. (App 38) citing *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69-71, 96 S.Ct. 2831, 49, L.Ed. 2d 788 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

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